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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

—VS.—

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE MINNESOTA SUPREME COURT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE MINNESOTA CIVIL LIBERTIES UNION AND THE MINNESOTA COALITION AGAINST CENSORSHIP, *AMICI CURIAE*

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members, dedicated to preserving and protecting the fundamental rights of the people of the United States. The Minnesota Civil Liberties Union (MCLU) is one of its state affiliates, a private, non-profit, membership-only organization having approximately 3,500 members in the State of Minnesota, and has as its purpose the protection of the rights and liberties preserved to the people by the Minnesota and United States Constitutions. Foremost among those liberties is the freedom of speech and the press, and both the ACLU and the MCLU have been active in the defense of these freedoms against laws lim-

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[1] Letters from both parties consenting to the filing of this brief have been lodged with the Clerk of this Court.

iting the flow of information the first amendment was enacted to secure.

The Minnesota Coalition Against Censorship (MCAC) is a private coalition of 24 organizations, including, among others, the American Association of University Women, the Minnesota Civil Liberties Union, the Minnesota Council for the Social Studies, the Minnesota Education Association, the Minnesota Educational Media Organization, the Minnesota Federation of Teachers, the Minnesota Library Association, the National Conference of Christians and Jews (Minnesota Division) and the Newspaper Guild of the Twin Cities. Its purpose is to oppose censorship of books, films, educational material and newspapers in the State of Minnesota. The MCAC was founded in 1978 to communicate censorship incidents to member groups, and to oppose abridgement of

freedom of expression through appropriate actions such as lobbying, public education in censorship matters and legal actions against the censor.

The law at issue here substantially abridges first amendment rights and denies equal protection of the laws by singling out newspapers, and among them two large newspaper companies, for a heavy tax. Because of the severe threat such taxes will pose, if upheld, to our nation's economically fragile and crucial major newspapers, the American Civil Liberties Union, the Minnesota Civil Liberties Union and the Minnesota Coalition Against Censorship submit this brief as amici curiae.

INTRODUCTION AND SUMMARY OF ARGUMENT

The appellant's jurisdictional state-

ment in this case was filed at a poignant moment: just after the announcement that the afternoon Star would be merged into the morning Tribune. According to a front-page story in the St. Paul Dispatch, March 24, 1982, "about 35 reporters and editors and 20 newsroom support people are facing layoffs. About 35 positions will be eliminated in the production and distribution departments." Even more significant losers, however, were the Star's 170,000 readers, as Minneapolis followed a sad national trend. The Star joined a casualty roll that already included the Washington Star, the Philadelphia Bulletin, the Chicago Daily News and many others, and continues to lengthen with the demise of the Cleveland Press in June 1982, of the Duluth Herald at the end of July 1982, and of the Des

Moines Tribune this coming fall.[2]

The present case is a constitutional challenge to Minnesota's "big newspaper tax," Minn. Stat. § 297A.14, third paragraph, which exploits the state's two major newspaper companies[3] as a revenue source while having little effect, and in almost all cases no effect at all, on the hundreds of other newspapers in the state. The tax is paid only by publishers, and there is no evidence that it has

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[2]The Minneapolis Star and Tribune Company, like many major publishers, has been under increasing financial pressure for several years. See, e.g., A Washington Post Bid to Buy into Cowles, Business Week, March 8, 1982, at 33; Star and Tribune Co. Annual Earnings Decline by 89%, Editor & Publisher, May 22, 1982, at 89. As further noted on page 16 infra, the tax at issue in this case is a large portion of Appellant's net profit.

[3]Appellant publishes the Minneapolis Star and Tribune, the state's largest newspaper. Knight-Ridder Newspapers, Inc., publishes the next three (previously four) major dailies in St. Paul and Duluth. (Knight-Ridder also found it necessary to merge its two Duluth newspapers at the end of July 1982, but, at least for the time being, still publishes two newspapers in St. Paul.)

ever been paid by anyone except newspaper publishers. In 1974 and 1975, the only years for which data appear in the record, the two companies paid almost 95% of all taxes collected under this law, and only ten others paid anything at all in either year. Minneapolis Star and Tribune Co. v. Commissioner of Revenue, 314 N.W.2d 201, 203-204 (Minn. 1981).

It appears that no other state has a "big newspaper tax" of any sort at present, and the only closely similar statute of which we are aware is the Louisiana tax on newspapers with circulations exceeding 20,000 struck down by this Court in Grosjean v. American Press Co., 297 U.S. 233 (1936).[4] As in this case, the

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[4] Another somewhat similar case is City of Tampa v. Tampa Times, 153 Fla. 709, 15 So.2d 612 (1943), in which the Florida Supreme Court, relying on Grosjean, struck down a city license tax of $40 for newspapers with less than 10,000 circulation, $500 from 10,000 to 30,000 circulation, and $700 for circulation exceeding 30,000. The

Louisiana statute was challenged on both first amendment and equal protection grounds. The Grosjean Court, however, in an opinion signed by Justice Sutherland but reportedly including a substantial contribution by Justice Cardozo,[5] spoke eloquently of the impossibility of such a tax under the first amendment, but found it unnecessary to reach the question of equal protection.[6]

The present case is an action for a refund brought by the Minneapolis Star and Tribune Company, which alone paid 67

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4 continued facts of the present case, however, are much more dramatic: all newspapers paid at least $40 in Tampa, whereas 97% pay nothing in Minnesota, and the difference between the largest and the smallest was only $660 in Tampa, but is over $600,000 in Minnesota.

5 See I. Brant, The Bill of Rights 397-399 (1967).

6 297 U.S. at 251. The district court, however, had found the Louisiana tax unconstitutional on equal protection grounds. American Press Co. v. Grosjean, 10 F. Supp. 161 (E.D. La. 1935).

and 68 percent of all taxes collected under this law in 1974 and 1975. The state District Court held the third paragraph of § 297A.14 unconstitutional under the free press and equal protection provisions of the United States and Minnesota Constitutions, and ordered the refund.

On appeal by the Commissioner of Revenue, the Minnesota Supreme Court reversed, upholding the tax essentially on the ground that it was part of a general, broadly based scheme of sales and use taxes. From this premise, it was held to follow that no equal protection issue arose as between newspapers and others subject to sales or use taxes, and that no first amendment issue arose at all, despite Grosjean, because the tax was on businesses rather than on expression. As to the focus on just two companies and the virtual or complete exemption for the

rest, that court found no equal protection problem, noting that the distinction "may be justified as a legislative policy to give favorable tax treatment to smaller enterprises,"[7] 314 N.W.2d at 209, although the Legislature had not stated this or any other justification. The court asserted that it was applying a "strict standard" of review, 314 N.W.2d at 207, but its version of strict scrutiny consisted of just two sentences:

> The sales and use tax law is a revenue-raising measure. This is perhaps the most compelling goal of a state government.[8]

Id. Nothing in the opinion discusses

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[7]Compare Buckley v. Valeo, 424 U. S. 1, 48 (1976): "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." See also page 52 infra.

[8]Compare Memorial Hospital v. Maricopa County, 415 U.S. 250, 263 (1974): "[A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens [cita-

whether, or even states that, the classification is necessary to the statute's articulated compelling interest. On the contrary, the opinion appears to be based on a practically irrebuttable presumption that tax laws are constitutional.

Amici urge that the decision of the Minnesota Supreme Court be reversed, and the tax declared unconstitutional, because:

1) the Minnesota Supreme Court's rulings were based on a grossly distorted interpretation of the facts, which is flatly contradicted by the information given in that court's own opinion;

2) the form, impact and potential

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8 continued

tion omitted], so appellees must do more than show that denying free medical care to new residents saves money. The conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State. [Citation omitted.]"

for abuse inherent in the unique type of tax imposed by Minnesota make it substantially identical to the Stamp Taxes and taxes on paper that it was among the first amendment's purposes to forbid; and

3) the Minnesota Supreme Court's novel approach to strict scrutiny, requiring a compelling interest but not that any relationship between the classification and the interest be shown, is contrary to every relevant modern decision of this Court.

ARGUMENT

I. THE "BIG NEWSPAPER TAX" APPLIES ONLY TO A FEW NEWSPAPERS, AND IS NOT AN ORDINARY PART OF A GENERAL SYSTEM OF SALES AND USE TAXES.

On July 6-10 and 13-17, 1970, the Minneapolis Tribune ran a series of ten front-page articles on "Influence and the

Legislature," focusing on conflicts of interest said to affect the actions of 11 named and pictured members of the State Legislature. The 11 included the Chairman and two other members of the Senate Committee on Taxes and Tax Laws, and two members of the House Committee on Taxes.

Possibly by coincidence, the predecessor of today's "big newspaper tax," in the form of a tax on paper and ink used by publishers of periodicals, was adopted by the Minnesota Legislature in 1971. Minn. Laws 1971, Sp. Sess., ch. 31, art. 1, § 5, subd. 1(i). That original law, however, applied to all paper and ink used in producing publications of all sorts, and accordingly aroused opposition from all parts of the state.

Perhaps this opposition would have led to the repeal of the tax in the Legislature's 1973 session. The Legislature

chose not to preserve a legislative history, but it may be inferred that when the suggestion was made that rural, small-town and weekly newspapers (and apparently all publications other than newspapers) be exempted by limiting the tax to annual usage in excess of $100,000, most of the opposition evaporated.[9] A tax on New York City is a

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[9] In its Motion to Dismiss, page 24, the State speculates about Appellant's motives in bringing this suit:

> Were the $100,000 exclusion removed, only a relatively minor tax would be collected from each of numerous small publishers but significantly increased taxes would be collected from large publishers.
>
> Needless to say, this is not the result sought by Star Tribune. Instead, Appellant seeks to have the entire use tax declared unconstitutional, with or without the $100,000 exclusion.

With no more, but certainly no less, basis in the record than the State can provide for this speculation or for its speculation about the Legislature's purposes (see pages 48-60 infra), it is submitted that a requirement that the tax apply to all or to none would have meant its complete, rather than partial, repeal in 1973. If that is

pleasant idea to Upstaters. A tax on Chicago is a pleasant idea to Downstaters. And a tax on "the Cities" is a pleasant idea to Minnesota Outstaters.

As it happened, the tax was repealed only in part: the tax on major newspapers such as the Appellant's was reduced by $4,000 per year, and the tax on their hundreds of smaller competitors was entirely eliminated. In 1974 and 1975, the only years for which data appear in the record:

the two major companies paid a total of	$1,736,902
all others combined paid a total of	99,508

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9 continued the case, and if the political situation has not changed on this point, the economic interests of Star Tribune would be equally served by a ruling that the tax is unconstitutional only because it discriminates between large and small newspapers, for that would result in a repeal of the entire tax. However, that would not be a satisfactory result from the civil liberties perspective, for it would allow taxes like Iowa's (see note 11 infra) to survive.

Perhaps such matters should ordinarily be left to the political processes, subject to the "one person, one vote" principle of Reynolds v. Sims, 377 U.S. 533 (1964). But this is not just a tax on the big cities; it is a tax on the big-city newspapers.

Only newspaper companies pay this tax. Only two newspaper companies pay more than a nuisance amount of tax--enough, for example, to justify the lawyer's fee for the first level of court challenge. 314 N.W.2d at 203-204. The great majority, 97% of Minnesota newspapers, pay nothing at all. Other industrial users of paper and ink, including, for example, tax-exempt producers of food packaging and school books, pay nothing at all. Minn. Stat. § 297A.25.

In two years, the Minneapolis Star and Tribune Company paid more than $1.2

million, and Knight-Ridder Newspapers, Inc., paid $493,000.

It would be too much to claim that the "big newspaper tax" killed the Star, or was intended to. But it would not be an exaggeration to say that its contribution may have been significant. In the fiscal year ended February 28, 1982, the Minneapolis Star and Tribune Company's net operating margin was only about $3.6 million, including its newspapers in other states and its television stations. St. Paul Pioneer Press/Dispatch, March 29, 1982, at 1B, col. 2. The tax, incidentally, was raised to 5% effective June 30, 1981, Minn. Laws 1981, ch. 1, art. IV, § 5, and the price of newsprint has risen sharply in recent years.[10]

The Minnesota Supreme Court, however, characterized this tax as part of

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[10] See pages 21-22 infra.

a general revenue-raising scheme. This Court has carefully distinguished between general business regulations, to which newspapers are subject in the same way as other businesses, and specific impositions on newspapers and expressive activities, which are highly suspect. See, e.g., Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) (Fair Labor Standards Act). Recognizing this, the Minnesota Supreme Court offered the theory that the "use tax" on newspapers, which are not subject to a sales tax, puts them in the same position as businesses whose products are subject to the sales tax. In its view, that made both the free press objections and the equal protection objections disappear:

> It is part of a general system of sales and use taxation to which most goods (other than food, clothing, and medicine)

> are subject in Minnesota.[11] Unlike the type of tax found to be unconstitutional in Grosjean, sales and use taxes are now commonplace and readily accepted. [Citations omitted.]

314 N.W.2d at 207.

The claim is not, of course, that "use taxes" on the paper and ink used by newspapers are widely accepted, for they

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[11] A footnote at this point reads, "Iowa imposes a similar tax on newsprint and ink. Iowa Code Ann. § 423.1, subd. 1 (West Supp. 1980)." The Iowa statute is indeed the only other law currently in effect that we have been able to find imposing a tax on paper and ink used by newspapers. It is far from "similar" to Minnesota's "big newspaper tax," however, because it applies to all newspapers, and even to "free newspaper[s] or shoppers guide[s]." Thus the similarity would only be to the 1971 version of the Minnesota statute, supra. Even so, it appears to share the constitutional infirmity of the Minnesota statute in that newspapers are singled out for a tax not imposed on other businesses. No decision on the constitutionality of the Iowa statute has been found.

It may not be insignificant that at least one major Iowa newspaper company, the Des Moines Register and Tribune Company, has recently found itself in serious financial difficulty, St. Paul Dispatch, March 19, 1982, at 11B, col. 2, and will have to merge its two newspapers into one this fall. See Editor & Publisher, June 5, 1982, at 10.

are not; apparently they exist only in Minnesota and Iowa. Rather it is that Minnesota's tax on paper and ink is part of a general system of sales and use taxes, and that systems of sales and use taxes are widely accepted. This is suspiciously close to a claim that any tax, however obvious its unconstitutionality, can be saved by re-labelling it a "use tax."

In fact, the "use tax" on paper and ink resembles other use taxes in name only. Section 297A.14 imposes a use tax on various personal property "unless the [sales] tax imposed by section 297A.02 was paid on said sales price. . . ." Section 297A.24 allows a deduction for the full amount of any tax on "sale, storage, use or other consumption" of the property in any other state, adding:

> If such tax imposed in such other state was equal to or greater than the tax imposed in

> this state, then no tax shall be due from such person under section 297A.14.

Thus the use tax on products other than newspapers is a "compensating" use tax, whose primary effect is to equalize competition between Minnesota retailers and retailers in states with lower sales taxes.

The "use tax" on newspapers, however, has a completely different, and even opposite, effect. Far from imposing a matching burden on out-of-state competitors, it imposes an unmatched burden on a few Minnesota newspapers.[12] Competing newspapers printed in other states, such as the Wall Street Journal, the Christian Science Monitor and the New York Times (all now widely available in Minnesota cities--in fact, home delivery of the

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[12]For 18th century parallels in New York and Massachusetts, see pages 27-29 infra.

Times is now available in some areas) pay no Minnesota taxes, and would pay none however large their Minnesota circulation became. Nor do they pay similar taxes in the states where they are printed. Perhaps most tellingly, they are not subject to the true compensating use tax applied to various other products from out of state. One cannot help observing that the national and out-of-state newspapers rarely criticize Minnesota politicians.

II. THE "BIG NEWSPAPER TAX" IS SIMILAR IN FORM, IMPACT AND POTENTIAL TO THE STAMP TAXES AND TAXES ON PAPER THAT IT WAS AMONG THE FIRST AMENDMENT'S PURPOSES TO FORBID.

Newsprint is not a minor factor in the production of a newspaper. For a newspaper with a circulation comparable to Star Tribune's, it was estimated for

1980 at well over 30% of total publishing costs. Newsprint Information Committee, Newspaper and Newsprint Facts at a Glance (23d ed. 1981). And the cost has been rising. See $525 a Ton Newsprint May Hurt Newspapers, Editor & Publisher, Feb. 20, 1982, at 12. When Juan Perón wanted to shut down La Prensa in Argentina, he did it by taxing newsprint. See G. Blanksten, Perón's Argentina 211 (1953).

A.

Taxation as an instrument for control of the press first appeared in England with the Stamp Act of 1712, 10 Anne cap. 18, which taxed newspapers, advertisements and paper. Like most of its successors, the 1712 tax was defended in part as a revenue-raising measure, but neither publishers nor the citizenry saw that as justification for interfering with the freedom of the press. The his-

tory of these despised taxes and their contribution to unifying the American colonists in rebellion against England is recounted by historians such as F. Siebert, Freedom of the Press in England 1476-1776, 305-322 (1952); C. Collett, History of the Taxes on Knowledge (1899); Z. Chafee, Jr., Free Speech in the United States (1967); and by the Court in Grosjean v. American Press Co., 297 U.S. 233 (1936).

The Stamp Tax of 1765 outraged the colonists. Prime Minister George Grenville had touched "each nerve center in American life at which either economic or intellectual activity was registered." J. Pole, Foundations of American Independence, 1763-1815, 42 (1973). "No group in America was more directly affected than the publishers of the twenty-four newspapers in the mainland colonies." M.

Jensen, The Founding of a Nation 126 (1968). Benjamin Franklin, who was serving as a colonial agent in London when the Stamp Act was adopted, wrote to America, "I think it will affect the Printers more than anybody . . . as a Sterling Halfpenny Stamp on every Half Sheet of a Newspaper, and Two shillings Sterling on every Advertisement, will go near to knock up one Half of both." Botein, Printers and the American Revolution, in B. Bailyn & J. Hench (eds.), The Press & the American Revolution 11, 23 (1980). Foreign-language publications had to pay twice the normal rates, a severe blow to the German-language Press around Philadelphia, leading Henrich Miller, a German-language publisher, to call the Stamp Act "the most unconstitutional law imaginable." Schlesinger, The Colonial Newspapers and the Stamp Act, 8 N.E.Q. 66, 70

(1935).

Some newspapers set off their columns with heavy black mourning margins the day before the tax went into effect, while others printed silhouetted skulls and crossed bones to symbolize a dead free press. J. Lofton, The Press as Guardian of the First Amendment 2 (1980); Jensen, supra, at 127. The New Hampshire Gazette represented itself as gasping, "I must Die, or submit to that which is worse than Death, be Stamped, and lose my Freedom." Schlesinger, supra, at 74 (emphasis in original). Many publishers defied the law, printing their newspapers on unstamped paper. In New York, Holt's Gazette added to its title the motto, "The United Voice of all His Majesty's free and loyal Subjects in America -- LIBERTY, PROPERTY and no STAMPS." Id. at 75 (emphasis in original).

"The newspapers played a tremendous role in political life from the Stamp Act onward." Jensen, supra, at 127. Newspapers reprinted liberally from each other, thus helping to unite the colonies. They appealed to the masses, stirred their emotions and urged them to action. Id. at 128. When stamped copies of newspapers from Barbados and Nova Scotia were found in Philadelphia, they were publicly burned. Schlesinger, supra, at 79 n. 33. Thus the British themselves helped to make the American press an instrument of revolution. Lofton, supra, at 2; Pole, supra, at 423.

In 1765, an assembly of delegates from nine of the colonies met as the "Stamp Act Congress" to protest the tax. A formal complaint was issued, entitled "A Declaration of Rights and Grievances," the basic principles of which were later

incorporated into the Declaration of Independence. Because of this opposition, the American Stamp Tax was repealed less than a year after its enactment. Chafee, supra, at 321. In 1787, a leading Anti-Federalist, Samuel Bryan, wrote in the Philadelphia Independent Gazette and Freeman's Journal that "[i]t was not the mere amount of the duty on stamps, or tea that America opposed, they were considered as signals of approaching despotism, as precedents whereon the superstructure of arbitrary sway was to be reared." 2 H. Storing (ed.), The Complete Anti-Federalist 176-177 (1981)(emphasis in original).

The English were surprised by the colonists' reaction, but the history of similar taxes in both New York and Massachusetts should have been a sufficient warning. New York had a short-lived tax on paper from 1756 to 1760, which met

with opposition including broadsides from printers about freedom of the press. L. Levy, Judgments: Essays on American Constitutional History 128 (1972). James Parker, printer of the New-York Gazette, called the tax "like to a killing Frost," and complained in particular that New York's stamp tax (like the modern tax in Minnesota) disadvantaged him in competition with printers in nearby colonies. Thompson, Massachusetts and New York Stamp Acts, 26 Wm. & Mary Q. 257 (1969); Botein, supra, at 24.

In Massachusetts another short-lived tax on paper was in effect from January 1755 to May 1757, forcing one Boston newspaper out of business. C. Duniway, The Development of Freedom of the Press in Massachusetts 120 (1906). In 1785, the state imposed a stamp tax on newspapers. This was purely a revenue measure,

but again there was much agitation. The tax was denounced as "the first Stone in the fabrick of Tyranny" in the Massachusetts Centinel. It was also argued that once allowed it might become punitive and so end press freedom, and that it discriminated (in much the manner of the modern tax in Minnesota) against Massachusetts printers, because the presses of the neighboring states could freely send their product into Massachusetts. The tax was repealed a year later, but the lost revenue was replaced by a tax on advertising, which was also resented. Duniway, supra, at 136-37 (emphasis in original).

One editor, Isaiah Thomas, suspended publication of his newspaper, the Massachusetts Gazette. In a letter to the editor of the Massachusetts Spy, he stated, "The tax on News-Paper Advertisements has

a direct tendency not only to restrain, but to destroy, those necessary vehicles of publick information, by taking away their only support. . . ." R. McCoy (ed.), Freedom of the Press 451 (1978). The tax was repealed in 1788. Thomas resumed publication after the two-year tax with greetings of thankfulness that the legislature had restored the constitutional liberty of the press. Duniway, supra, at 137.

Richard Henry Lee of Virginia, who later signed the Declaration of Independence and was president of the Continental Congress, rose to political prominence about the time of the British Stamp Act of 1765. He thought it a threat to the rights of Englishmen, and became a popular hero and leader of the Sons of Liberty in Virginia, in part by expressing that view. E. & H. Morgan, The Stamp

Act Crisis 293-94 (1953); L. Levy (ed.), Freedom of the Press from Zenger to Jefferson 142 (1966). When the Constitution was proposed, he became a leading Anti-Federalist, and in his Letters from the Federal Farmer voiced the concerns arising from the lack of a Bill of Rights, emphasizing the fears his earlier experiences showed to be real threats:

> All parties apparently agree, that the freedom of the press is a fundamental right, and ought not to be restrained by any taxes, duties, or in any manner whatever. Why should not the people, in adopting a federal constitution, declare this, even if there are only doubts about it. But, say the advocates, all powers not given are reserved:--true; but the great question is, are not powers given, in the exercise of which this right may be destroyed. . . . By art. 1. sect. 8. congress will have power to lay and collect taxes, duties, imports and excise. By this congress will clearly have power to lay and collect all kind of taxes whatever--taxes on houses, lands, polls, industry, merchandize, &c.--taxes on deeds, bonds, and all written

> instruments--on writs, pleas, and all judicial proceedings, on licences, naval officers papers, &c. on newspapers, advertisements, &c. and to require bonds of the naval officers, clerks, printers, &c. to account for the taxes that may become due on papers that go through their hands. Printing, like all other business, must cease when taxed beyond its profits; and it appears to me, that a power to tax the press at discretion, is a power to destroy or restrain the freedom of it. There may be other powers given, in the exercise of which this freedom may be effected; and certainly it is of too much importance to be left thus liable to be taxed, and constantly to constructions and inferences.

L. Levy (ed.), Freedom of the Press from Zenger to Jefferson 143-44 (1966).

Fear of taxes on newspapers was expressed in other states as well. The New York Anti-Federalist Melancton Smith, in his Address to the People of New York in 1788, agreed with Lee: "We contend, that by the indefinite powers granted to the general government, the liberty of the

press may be restricted by duties, &c. and therefore the constitution ought to have stipulated for its freedom." 1 B. Schwartz (ed.), The Bill of Rights: A Documentary History 576 (1971). In New Hampshire, Chief Justice Thomas Cogswell wrote in his 1788 "Essay by a Farmer" that "[t]he liberty of the Press is essential to a free people, it ought therefore to be inviolably preserved and secured in the Bill of Rights, and no duty or tax to be imposed thereon, of what name or nature soever." 4 H. Storing, supra, at 206-207. The Philadelphia Freeman's Journal said on February 20, 1788, "Congress may, under the sanction of that clause which empowers them to lay and collect duties . . . impose so heavy a stamp-duty on newspapers and other periodical publications, as shall effectually prevent all necessary information to the

people through these useful channels of intelligence." 3 H. Storing, supra, at 179 (emphasis in original).

In response, Federalists asserted that a Bill of Rights was unnecessary because the powers of the government were enumerated and did not include any power to tax the press. E.g., 1 B. Schwartz, supra, at 444; The Federalist No. 84 (A. Hamilton). James Iredell, later to be a Justice of this Court, stated:

> The liberty of the press is always a grand topic for declamation, but the future Congress will have no other authority over this than to secure to authors for a limited time an exclusive privilege of publishing their works. . . . If the Congress should exercise any other power over the press than this, they will do it without any warrant from this constitution, and must answer for it as for any other act of tyranny.

1 B. Schwartz, supra, at 454.

In response to arguments of this sort, a pamphlet p[illegible]ted in 1787 in Phil-

adelphia replied:

> It hath been said that the objection with respect to the freedom of the Press is not valid, because the power of controuling that is lodged with the several states.
>
> A little consideration will show that this, though perhaps just in itself, is but a specious pretext. Congress have power to lay all duties of whatever kind, and although they could not perhaps directly bar the freedom of the Press, yet they can do it in the exercise of the powers that are expressly decreed to them. Remember there are such things as stamp duties and that these will as effectually abolish the freedom of the press as any express declaration.

3 H. Storing, supra, at 81-82 (emphasis in original).

Federalists and Anti-Federalists are thus seen to have agreed that Congress ought not to be allowed to tax the press, and perhaps that such taxes would be contrary to natural law. They disagreed only as to whether the point needed to be spelled out as part of a Bill of Rights

or could be relied on as implicit in a system of enumerated powers. In the end, the Federalists got their Constitution, but only on the understanding that a Bill of Rights would be added, including explicit protection for the freedom of the press from stamp taxes and censorship.

B.

Like the Stamp Act of 1712, the Massachusetts acts of 1755 and 1785, the New York act of 1756 and the Stamp Act of 1765, the Minnesota statute is in part a tax on paper. Indeed, it outdoes them by taxing ink also. "[T]his is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press." Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

In Grosjean, the Court said nothing at all about Huey Long and the political

background of the newspaper tax, although the most damning sort of evidence of invidious intent was available. E.g., Transcript of Record at 43. Under the circumstances, the Court's silence regarding Long's machinations is deafening.[13] As a later Court observed in United States v. O'Brien, 391 U.S. 367, 384-385 (1968), Grosjean stands

> not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional. Thus, in Grosjean the Court, having concluded that the right of publications to be free from certain kinds of taxes was a freedom of the press protected by the

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[13] In its Motion to Dismiss, page 9, the State asserts that "Both Star Tribune and Amicus Minnesota Civil Liberties Union . . . would like to minimize or ignore this important aspect of the Grossjean [sic] case." On the contrary, it is submitted that this Court itself took pains "to minimize or ignore" the Louisiana details, in order to emphasize first amendment principles of much broader application.

> First Amendment, struck down a statute which on its face did nothing other than impose just such a tax.

Even the issue of equal protection, relied on by the district court, American Press Co. v. Grosjean, 10 F. Supp. 161 (E.D. La. 1935), was omitted from this Court's discussion, because the Court preferred to emphasize first amendment principles. 297 U.S. at 251. The Court's opinion, by Justices Sutherland and Cardozo, stood on high ground:

> The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is

> bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

297 U.S. at 250.

The Minnesota Supreme Court seeks to drain this paragraph of its force by omitting several of its sentences. 314 N.W.2d at 206. But even what remains can be given the interpretation urged by the Minnesota court only if one has not read the remainder of this Court's opinion, for the words "in the light of its history and of its present setting" are the only words in the entire opinion that can

be read as referring in any way to the political situation in Louisiana.

Some other courts, however, sought to narrow the impact of Grosjean by emphasizing the matters this Court had chosen to omit. One justice of the Arizona Supreme Court characterized Grosjean as based on "a situation . . . in the state of Louisiana which was unparalleled in American history." Giragi v. Moore, 49 Ariz. 74, 85, 64 P.2d 819, 823 (Lockwood, J., concurring), appeal dismissed, 301 U.S. 670 (1937). As a distinction, however, this was surely overkill, because the Arizona tax applied to "the sales or gross income of practically every person or concern engaged in selling merchandise or services in the state." 49 Ariz. at 79, 64 P.2d at 821. No tax could more easily be distinguished from the tax only on newspapers with a circulation exceed-

ing 20,000 in Louisiana, or the tax only on newspapers using more than $100,000 worth of paper and ink in Minnesota.

This Court has not sought to confine Grosjean to its "unparalleled" facts. Instead it has treated burdens that single out newspapers as highly suspect, but general regulation and taxation, in which newspapers are treated like all or most other enterprises, as proper. For example, in Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946), a newspaper was held subject to the Fair Labor Standards Act. The Court distinguished Grosjean:

> There the press was singled out for special taxation and the tax was graduated in accordance with volume of circulation. No such vice inheres in this legislation. As the press has business aspects, it has no special immunity from laws applicable to business in general.[14] [Citation omitted.]

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[14] The Court continued:

> And the exemption of small weeklies and

Id. at 184. Much the same point seems to have been made in Grosjean itself, when the Court observed, "The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented." 297 U.S. at 250.

Although the reading of Grosjean by the concurring justice in Giragi v. Moore, supra, was extremely narrow, the Arizona court's holding with regard to

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14 continued

> semi-weeklies is not a "deliberate and calculated device" to penalize a certain group of newspapers. Grosjean v. American Press Co., supra, p. 250. As we have seen, it was inserted to put those papers more on a parity with other small town enterprises. [Citation omitted].

327 U.S. at 184. Plainly there is no evidence of such a benign intent in the present case. Quite the contrary: if it is accepted arguendo that the so-called "use tax" is to compensate for a sales-tax exemption, the smaller Minnesota newspapers are given an advantage not enjoyed by "other small town enterprises," which are subject to sales taxes.

discrimination against newspapers[15] in the latter case was consistent with Grosjean. This seems a sufficient explanation of this Court's dismissal of the appeal; in any event, summary disposition can hardly be considered a ratification of the concurring opinion below. See Washington v. Confederated Banks and Tribes, 439 U.S. 463, 477 n. 20 (1979).

The present decision, in sharp contrast, will, if allowed to stand, open

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[15] If there is a valid objection to Giragi's holding (as distinguished from the excesses of Justice Lockwood's obiter dicta), it would be that sales taxes on newspapers are unconstitutional even if they are imposed on all other businesses as well. See Minn. Atty. Gen. Op. No. 90 (1948). That question is not presented in this case, because the Minnesota tax applies only to newspapers.

Nevertheless, the State appears to argue 1) that sales taxes on newspapers are constitutional, and 2) that any tax somehow related to sales taxes on other products may therefore be imposed on newspapers. Even if the first point is accepted (and this Court has never ruled on the issue), it is obvious that the second does not follow. If it did, the first amendment would place no meaningful limits at all on taxation of the press.

the door to widespread use of a particularly burdensome and offensive tax specifically on newspapers at a moment when the press is particularly vulnerable.

III. THE MINNESOTA SUPREME COURT CORRECTLY STATED THAT STRICT SCRUTINY WAS APPROPRIATE, BUT FAILED TO APPLY THAT STANDARD; ANALYSIS OF THE FACTS SHOWS THAT THE STATUTORY CLASSIFICATION IS NOT NECESSARY TO ANY COMPELLING GOVERNMENTAL INTEREST.

"[R]egulation of First Amendment rights is always subject to exacting judicial scrutiny." Citizens Against Rent Control v. City of Berkeley, 102 S.Ct. 434, 438 (1981).

A.

The Minnesota Supreme Court did not just misinterpret or alter strict scru-

tiny; it did not apply the rule at all.

According to the standard analysis, the Minnesota statute's classification affects the fundamental freedom of speech and the press.[16] Accordingly, strict scrutiny is appropriate:

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[16]The Minnesota tax is vulnerable to several constitutional objections. In choosing which to emphasize, this Court ought to consider, as did the Court in Grosjean, supra, which points have the greatest constitutional significance. In our view, these are freedom of the press and the related issues of equal protection and fundamental freedoms discussed in this portion of the brief. It would appear, however, that a tax graduated in this way unconstitutionally denies equal protection if applied to any sort of business, even without first amendment overtones. Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, rehearing denied, 295 U.S. 768 (1935).

As to this, both the Minnesota Supreme Court and the State's Motion to Dismiss offer the startling argument that Stewart Dry Goods is inapplicable because it

> dealt with a totally different kind of tax than the one at issue herein. In Stewart Dry Goods, the tax in question was a "gross sales tax" on the privilege of doing business as a retailer, i.e., it was a tax on total gross receipts without taking into account either expenses or profitability.

> This test means that the justices will not defer to the decision of the other branches of government but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling end. . . . The Court will not accept

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16 continued Motion to Dismiss at 27. This is an elaboration on the Minnesota court's formulation:

> We do not find the reasoning of Stewart Dry Goods and National Tea [Co. v. State, 205 Minn. 443, 286 N.W. 360 (1939), vacated and remanded, 208 Minn. 607, 294 N.W. 230 (1940)] persuasive in the context of this case. Section 297A.14 differs from the taxes rejected in those cases. It is not a "privilege" tax, supposedly justified because the value of the "privilege" increases in the higher brackets.

314 N.W.2d at 209.

But section 297A.14 is, according to its opening words, "For the privilege of using, storing or consuming in Minnesota . . ." (emphasis added), and everyone agrees that the tax is imposed "without taking into account either expenses or profitability." What remains appears to be the assertion that the use tax on big newspapers is "a totally different kind of tax" from the sales tax in Stewart Dry Goods. This is difficult to reconcile with the claim that the sales tax and the "use" tax on big newspapers are really the same thing, which seems to be essential to the remainder of the State's case.

> every permissible government purpose as sufficient to support a classification under this test, but will instead require the government to show that it is pursuing a "compelling" or "overriding" end--one whose value is so great that it justifies the limitation of fundamental constitutional values. Even if the government can demonstrate such an end, the Court will not uphold the classification unless the justices have independently reached the conclusion that the classification is necessary to promote that compelling interest. If the justices are of the opinion that the classification need not be employed to achieve such an end, the law will be held to violate the equal protection guarantee.

J. Nowak, R. Rotunda & J. N. Young, Constitutional Law 524 (1978). See Elrod v. Burns, 427 U.S. 347, 362-363 (1976).

The classification established by the third paragraph of Minn. Stat. § 297A.14 is (1) newspapers using over $100,000 worth of paper and ink, and (2) everyone else. The Minnesota Supreme Court asserts that the relevant govern-

mental interest is revenue raising, and that "[t]his is perhaps the most compelling goal of a state government." 314 N.W.2d 201, 207. The court's analysis stops at that point, apparently indicating (1) that the necessity of this classification if this end is to be achieved is so self-evident as to make articulation superfluous, or (2) that a different rule of federal constitutional law applies in Minnesota. The latter would be along the lines of "any statute is permissible if it appears to be related to a compelling goal, such as raising revenue."[17] Stated more concretely, "all taxes raise revenue, and therefore all taxes survive strict scrutiny."

We are unwilling to presume, and we assume that this Court will not presume, that the Minnesota Supreme Court intended

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[17] See note 8 supra.

to defy all of this Court's modern rulings on equal protection. The Minnesota Supreme Court must therefore be understood to have meant that it had determined, through its independent examination of the facts, that the classification is necessary to revenue raising, and that this revenue could not be collected effectively without a classification of at least this general type.

But this too is nonsense. It is obvious that a great deal more revenue would be raised without the exemption of 97% of the state's newspapers and all of the out-of-state newspapers. That is, simple revenue raising may well be "the most compelling goal of a state government," 314 N.W.2d at 207, but it clearly is not the goal of the third paragraph of section 297A.14.

"The state may justify a limitation

on religious liberty by showing that it is essential to accomplish an overriding governmental interest," United States v. Lee, 50 U.S.L.W. 4201, 4203 (1982), and the same sort of showing is permitted with regard to other first amendment freedoms. The Minnesota Legislature, however, chose to provide no legislative history for this statute. Nor did it articulate the classification's purpose in any other way. But

> [t]he interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. [Citations omitted.]

Elrod v. Burns, 427 U.S. 347, 362 (1976).

> Statutes that trench on fundamental liberties, like those affecting significantly the structure of our government, are not entitled to the same presumption of constitutionality we normally accord legislation. [Citation omitted.] The burden of justification is reversed; the burden rests upon government, not on the individual whose liberties are af-

fected, to justify the measure. [Citation omitted.]

Nixon v. Administrator of General Services, 433 U.S. 425, 526-527 (1977) (Burger, C.J., dissenting).

Even where a less exacting standard than strict scrutiny applies, the Court has ignored post hoc rationales in striking down legislation. See, e.g., Mississippi University for Women v. Hogan, 50 U.S.L.W. 5068, 5071-72 (1982); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 653 (1974) (Powell, J., concurring in the result); Griswold v. Connecticut, 381 U.S. 479, 505 (1965) (White, J., concurring).

In minimum rationality cases, this Court has sometimes accepted a "conceivable basis" for a statute whose purpose was not articulated, demanding only that the basis, assuming it to exist, would be legitimate, and that it not be inconsis-

tent with the known facts. See, e.g., Allied Stores v. Bowers, 358 U.S. 522, 530 (1959). But even if minimum rationality were the standard, the "big newspaper tax" could not be justified. The only purpose suggested so far is giving smaller newspapers a competitive advantage over the larger ones, 314 N.W.2d at 209, and the Court has often stated that purpose to be unconstitutional. Buckley v. Valeo, 424 U.S. 1, 48 (1976); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Citizens Against Rent Control v. City of Berkeley, 102 S.Ct. 434 (1981).

In searching for a rationale, one is eventually compelled to inquire: if the state wished to tax newspapers as part of a general scheme of sales taxes, why did it not simply impose a sales tax on newspapers? One reason appears to be that in

1948 the Minnesota Attorney General advised the Minneapolis City Attorney that such a tax would be unconstitutional. Minn. Atty. Gen. Op. No. 90 (1948). It would seem to go without saying that if a sales tax on newspapers would be unconstitutional, any tax intended to compensate for the newspapers' sales-tax exemption must be equally unconstitutional.

If, on the other hand, a sales tax on newspapers would not be unconstitutional, the point of the "use tax" must be that it accomplishes something a sales tax could not. The Minnesota Supreme Court refers at one point to "the difficulties and expense of collecting sales tax upon sales of such low-priced items," 314 N.W.2d at 207, but the Minnesota sales tax applies to other products costing as little as ten cents. Minn. Stat. § 297A.03. Since May 1, 1982, it applies

to candy, ice-cream cones, chewing gum and soft drinks. Minn. Laws 1982, ch. 523, art. 34 § 1. The daily Star and Tribune, like the daily Knight-Ridder newspapers in St. Paul and Duluth, currently sells for 25¢.

Even if the real concern behind the Legislature's unwillingness to employ a sales tax had been, say, the difficulties in imposing tax-collection duties on carriers (who collect monthly or bi-monthly anyway, not daily), Minnesota could have adopted an exemption for newspapers delivered by carriers while imposing the tax on newspapers sold by others. See, e.g., W. Va. Code § 11-15-9(12).

"How often have I said to you that when you have eliminated the impossible, whatever remains, however improbable, must be the truth?" Attributed to Sherlock Holmes by A. C. Doyle, The Sign of

Four (1890) (emphasis in original).

B.

The Commissioner of Revenue and the Minnesota Supreme Court seem ultimately to fall back on the theory that a law adversely affecting the exercise of first amendment freedoms is unconstitutional only if the legislature can be shown to have intended to interfere with those freedoms. This theory is so contrary to everything this Court has ever said on the point, and so dangerous, that it ought to be addressed and rejected expressly.

First, this Court has frequently repeated that invidious intent need not be found to invalidate interferences with first amendment freedoms.

> In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of

> such rights, even though unintended, may inevitably follow from varied forms of governmental action. . . . Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment. Grosjean v. American Press Co., 297 U.S. 233; Murdock v. Pennsylvania, 319 U.S. 105.

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 461 (1958).[18] Similar statements appear in many other cases, including Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 297 (1961); NAACP v. Button, 371 U.S. 415, 438-439 (1963); and Buckley v. Valeo, 424 U.S. 1, 65 (1976).

Second, the State's entire argument on this point rests on the lack of legis-

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[18] As more fully set out on pages 37-38 supra, this Court in United States v. O'Brien, 391 U.S. 367, 384-385 (1968), expressly interpreted Grosjean as standing for the proposition that the effect of burdening freedom of the press was sufficient to make a tax unconstitutional, even without a showing of improper legislative motive.

lative history, a matter controlled by the Legislature itself. The effect of accepting the State's argument would be to license every legislature to ignore the first amendment, provided only that it carefully avoided saying that was its intent.

It is for exactly this reason that the burden of producing direct evidence of specific intent cannot be, and never has been, held to rest on the party claiming the protection of the first amendment.[19] There is no doubt in this case that the burden of Minnesota's tax falls almost exclusively on two newspaper companies. The State would have this Court presume, at least until a smoking gun is produced, that this is purely co-incidental--that the Legislature did not

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[19]Sample cases on this point are quoted on pages 49-51 supra.

intend to discriminate against those two companies. But just as there is no evidence in this (summary judgment) record to show that the Legislature intended the tax as an attack on the big newspapers, there is no evidence in the record to show that this was not the Legislature's intent.

Indeed, the entire record is consistent with, though it does not prove, the thesis that the Legislature was out to get the Minneapolis Star and Tribune Company, or both it and the St. Paul Pioneer Press and Dispatch. If--in some other state--the legislature really were out to get its largest newspapers, and took pains to provide no legislative history, what could those newspapers do to protect themselves?

The State's response, in effect, is 1) How dare you suggest such a thing!

and 2) If we were out to get the Star and Tribune how come it's still in business? Motion to Dismiss, page 11 n. 6. This amounts to the State saying, "Trust us. Your government won't hurt you." But the Bill of Rights, indeed the entire Constitution, exists because we know that government does overstep now and then. The fundamental freedoms enshrined in the first amendment require the full protection of what has come to be called strict scrutiny: clear proof, provided by the government and independently found sufficient by the Court, that the classification is necessary to a compelling state interest.

In the present case, the State has offered no proof at all beyond an asserted presumption of legislative regularity, and no legitimate state interest --compelling or otherwise--has even been

mentioned to which the statutory classification would be necessary. As a result, the third paragraph of § 297A.14 must be held unconstitutional.

CONCLUSION

The tax on paper and ink necessarily reduces publication, if not directly then indirectly by forcing up the prices of advertising and subscriptions. But a tax that applies solely to and tends to discourage a constitutionally protected activity requires a heightened sensitivity to its particular effects. In this case, it is clear that the Minnesota Legislature has gained a weapon that can be used with great precision against particular newspapers.[20] It is the very precision of the "use tax" that makes it such an

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[20]This point may be obscured by the roundness of the figure $100,000, and by the fact that a few other companies paid some tax in the years for

offensive violation of the freedom of the press.

Compared to the enormous burden it places on free expression and particularly on two specific newspaper companies, this tax generates a small portion of Minnesota's overall revenues ($3.6 billion in fiscal 1980). But it provides a constant threat to a few publishers who must now look over their shoulders toward the Legislature, knowing that it is capable of directly penalizing them without

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20 continued which evidence appears in the record. Had the exemption been, say, a round $500,000, only three companies would have paid anything in those years. (The Rochester Post-Bulletin would have paid about $3,300 in 1975, for example, or about 0.4% of all taxes collected under this law for that year, while Star Tribune and Knight-Ridder would have paid 75.5% and 24.1% respectively, not far from the percentages they actually paid.) Had the exemption been $600,000 in 1975, only the four Twin Cities newspapers--not even Knight-Ridder's Duluth papers--would have paid any tax. 314 N.W.2d at 203-204. If the present classification is constitutional, it is difficult to see why the $500,000 and $600,000 classifications would not be.

fear of affecting other business constituents. If the decision is allowed to stand, the same weapon may be available to the legislatures of other states.

The decision of the Minnesota Supreme Court upholding the "big newspaper tax" contradicts fundamental first amendment principles. The American Civil Liberties Union, the Minnesota Civil Liberties Union and the Minnesota Coalition Against Censorship urge this Court to reverse and to declare the third paragraph of Minn. Stat. § 297A.14 unconstitutional.

Respectfully submitted,

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